

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LOVERN ONFROY,	*	Case No. 22-CV-02314 (EK)
	*	
Plaintiff,	*	Brooklyn, New York
	*	August 16, 2023
v.	*	
	*	
THE LAW OFFICES OF	*	
GEOFFREY T. MOTT, P.C.	*	
et al.,	*	
Defendants.	*	
	*	
* * * * *		

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE ERIC R. KOMITEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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For Mott Defendants: DAVID J. PRETTER, ESQ.
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1 (Proceedings commenced at 2:46 p.m.)

2 THE CLERK: Civil Cause for oral argument, Onfroy
3 versus The Law Offices of Geoffrey T. Mott, P.C., et al,
4 Docket No. 22-CV-02314.

5 Would you please state your appearances for the
6 record starting with the plaintiff.

7 MR. KESHAVARZ: Ahmad Keshavarz, The Law Office of
8 Ahmad Keshavarz. Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. SCHWARTZ: Jonathan Schwartz, Nassau/Suffolk Law
11 Services.

12 MR. D'ERCOLE: John D'Ercole with the law firm of
13 Leech Fishman Robinson Brog on behalf of the defendant Kenneth
14 DeCota. Good afternoon, Your Honor.

15 THE COURT: Good afternoon.

16 MR. PRETTER: David Pretter for the I guess we'll
17 call them the Mott defendants, all other defendants, from the
18 Law Office of Alan J. Sasson. Good afternoon.

19 THE COURT: You're here for not the Mott defendants,
20 but all --

21 MR. PRETTER: Only Mott defendants.

22 THE COURT: Okay.

23 MR. PRETTER: Sorry.

24 THE COURT: Okay. All right. We're here, as you
25 all know, in connection with the defendants' motion to dismiss

1 on both jurisdictional grounds and for failure to state a
2 claim. We'll begin with defense counsel today.

3 MR. PRETTER: I guess, if you don't mind, I'll
4 start, Your Honor, regarding the jurisdictional grounds.

5 Our motion was based upon the *TransUnion* decision by
6 the Supreme Court that in order to establish standing, for
7 Article 3 standing, there has to be injury, in fact, that is
8 concrete, particularized, and actual imminent.

9 In this instance, we feel that there has been no
10 concrete harm on behalf of the plaintiff.

11 THE COURT: Why isn't the expenditure of court costs
12 concrete harm?

13 MR. PRETTER: She put down in her pleadings that she
14 had paid for parking meters, copying, as having time taken off
15 for work, and multiple court settings.

16 Her court costs are free covered by the Legal
17 Services from Nassau. The parking meters and copying, parking
18 meters, there's ample free parking over there at the Nassau
19 County courthouses. Copying also was done in regard to her
20 Legal Services. And all those costs will be --

21 THE COURT: Sorry. You're disputing the fact?
22 She says, she alleges, I paid for copying --

23 MR. PRETTER: Right. And maybe there's --

24 THE COURT: -- out of pocket, and you're saying you
25 don't believe it?

1 MR. PRETTER: Well, her legal fees are free legal
2 fees. In any event, those fees would be incurred as a result
3 of any proceedings that would have to be taken place for any
4 eviction. She agrees that she is not paying any rent and
5 she's living there.

6 THE COURT: I think you're -- I think you may be not
7 focusing on what I see as the main question here.

8 She alleges -- the fraudulent conduct she alleges
9 under the FDCPA is the filing of duplicative lawsuits for the
10 same relief. Right?

11 Where she, I think, acknowledges, or at least
12 doesn't contest that she hasn't paid rent, that's surely not
13 the issue here.

14 The issue is whether or not the defendants have
15 engaged in the conduct that the statute is intended to reach.

16 And while the conversation, I assume at some point
17 later, about whether filing two lawsuits for the same relief,
18 and I think it's alleged stating to the Court in at least one
19 of those lawsuits that no other action for the same relief is
20 pending, a blatantly false statement as alleged, we'll talk
21 about whether that is conduct that the statute reaches or not.

22 But right now I'm talking simply about whether she's
23 alleged concrete injury for *TransUnion* purposes.

24 And I would have thought the statement that I paid
25 money out of pocket for copying satisfies that. Or at least

1 if you're saying it doesn't, that you would have a case on
2 that particular issue, legal fees and costs, under the FDCPA
3 to bring to my attention on the standing issue.

4 MR. PRETTER: Yes, Your Honor.

5 THE COURT: But aren't we assuming, before we even
6 get to that question, aren't we even assuming for today's
7 purposes that indeed she is out of pocket some money for
8 copying since she alleges that?

9 Where just -- can I just pause and ask the
10 plaintiffs what paragraph, remind me, am I looking in the
11 amended complaint to see the statement of her out-of-pocket
12 court costs?

13 MR. KESHAVARZ: One moment, please. One upside of
14 having a lengthy complaint, it gives them a factual basis for
15 the claims. And one downside is --

16 THE COURT: The complaint --

17 MR. KESHAVARZ: -- it's difficult to find the
18 specific paragraph.

19 THE COURT: Speaking of which, the complaint is
20 surely substantially lengthier than it needed to be. There's
21 a massive recitation of the entire procedural history in state
22 court that I think we could have at least mostly done without,
23 if not entirely, and we'll talk about that later as well. But
24 I digress.

25 MR. KESHAVARZ: Page 47, paragraph 278. In addition

1 to her emotional injury, Ms. Onfroy has also incurred monetary
2 costs due to court hearings, namely paying for parking meters
3 and copying, as well as lost time in having to take off work
4 for multiple court settings.

5 THE COURT: So I'm focused on copying. And this
6 says Ms. Onfroy has incurred monetary costs for copying. You
7 obviously stand by that allegation?

8 MR. KESHAVARZ: Yes.

9 THE COURT: Okay. So we're obligated to assume the
10 truth of her allegations at this stage, right? And one of her
11 allegations is that she, Ms. Onfroy, herself, is out of pocket
12 for court costs, including copying.

13 Is that or is that not a concrete injury for
14 purposes of standing?

15 MR. PRETTER: No. I would say -- that's not for --
16 on two bases, Your Honor. And the first base is that --

17 THE COURT: Point me to a case.

18 MR. PRETTER: -- that these costs would be incurred
19 in any sort of --

20 THE COURT: Point me to a case. This is not the
21 first time somebody has litigated the question of whether
22 court costs are concrete injury or not and everybody should
23 have a case for or against that proposition.

24 MR. PRETTER: I'm sorry. I don't have that in front
25 of me. I did see --

1 THE COURT: Take your time. I assume it's in your
2 brief?

3 MR. PRETTER: Yeah. I'm sorry, Your Honor, for not
4 having it in front of me here, but I believe it's from the
5 *TransUnion* matter which had that the concrete harm is still
6 not enough that any fees involved in the litigation.

7 THE COURT: Let's look at *TransUnion* for a second.
8 I have that in front of me right now. *TransUnion* holds, so
9 *TransUnion* was about people whose credit files with credit
10 reporting agencies were alleged to have included false or
11 misleading information. And the Supreme Court says the risk
12 of future harm to consumers as a result of misleading alerts
13 in their credit files which had not yet been disseminated to
14 any third-party business did not supply a basis for Article 3
15 standing to seek damages.

16 So that doesn't help you. Right? This is not a
17 case where somebody is saying, oh, there's something in my
18 file that's misleading and that could hurt me in the future.
19 She's saying I've been hurt already. I had to pay out-of-
20 pocket court costs.

21 So I see Judge Ross citing a case called *Steel Co.*
22 *v. Citizens for a Better Environment* that says reimbursement,
23 sorry, this is a Supreme Court case from 1998, Judge Ross is
24 citing it in *Cavazzini, C-A-V-A-Z-Z-I-N-I, vs. MRS Associates,*
25 Eastern District 2021, for the proposition that reimbursement

1 of the costs of litigation cannot alone support standing.

2 But that may relate to -- she's not saying her
3 injury is the fees she's paying her lawyers for this case,
4 which I think is the analog that we're seeing in this
5 *Cavazzini* situation, she's saying they sued me in a way that
6 was misleading and violates the FDCPA. In state court I
7 incurred actual fees digging myself out from that fraudulent
8 course of conduct and those are the fees I'm seeking to
9 vindicate here, not my instant legal fees.

10 MR. PRETTER: Even in that instance, Your Honor, she
11 was represented by free legal counsel. Even in the court for
12 state court proceedings for her eviction.

13 THE COURT: Right. That's why she's not asking for
14 legal fees.

15 MR. PRETTER: She's asking for copying, which she
16 doesn't say what the copying is for.

17 THE COURT: You're saying she hasn't been specific
18 or particularized enough about --

19 MR. PRETTER: Correct. Right. And so that even to
20 show a standing, if the concrete and particularized is per
21 *TransUnion*, to show what your harm would be.

22 And besides for the emotional distress, that's
23 several case law that emotional stress doesn't even bring the
24 right for a standing in Article 3 here.

25 THE COURT: Yeah. I'm not so focused on the

1 emotional distress here. I think a bunch of judges have
2 opined on that in a way that's favorable to you. I'm not sure
3 that's dispositive, but that's something I've seen.

4 Okay. I think we might need supplemental briefing
5 on the question of whether -- unless the plaintiffs are going
6 to tell me that they have a case to the contrary.

7 Is there a case that you cite on the standing issue
8 that makes clear that incurring court costs and responding to
9 FDCPA violating litigation suffices for *TransUnion* purposes?

10 MR. KESHAVARZ: I believe so. That's the *Tost* case.
11 I believe the Fourth Circuit. Let me tell you exactly where
12 it is in our brief.

13 THE COURT: The Fourth Circuit is not that helpful
14 because we're not in the Fourth Circuit, but it might be a
15 start.

16 MR. KESHAVARZ: One moment. Let me give you the
17 cite. We cite that on page 28 of our opposition, docket entry
18 35, page 28. Last two lines. Time spent -- "Time or money
19 spent in defending against an improper legal action taken by a
20 debt collector, taken by a debt collector against the" debtor
21 is concrete injury. The quote goes from the beginning up
22 until the word debtor.

23 THE COURT: What year is that case?

24 MR. KESHAVARZ: September 7th, 2022.

25 THE COURT: Okay.

1 MR. KESHAVARZ: And then the subsequent cases, two
2 Supreme Court cases and the Second Circuit case, say even a
3 very small amount of monetary harm is enough for standing.
4 One is for \$5 plus costs. And the Second Circuit says any
5 monetary loss suffered by a plaintiff suffers -- satisfies
6 this element.

7 THE COURT: Okay. All right. Let's move on to the
8 merits then.

9 Does filing two different lawsuits seeking the same
10 recovery and allegedly representing to at least one of those
11 courts that no other action is pending for the same relief?

12 MR. D'ERCOLE: Let me address that, Your Honor. I
13 represent the defendant, Mr. DeCota, who made the application
14 for default judgment as a newly minted attorney.

15 Now, I take issue with your statement where you said
16 that the statement in the affidavit, the generic statement,
17 usually made in this type of application in most New York
18 courts is a blatant misstatement. The actual words --

19 THE COURT: Sorry. Most New York courts what, what
20 was that last part?

21 MR. D'ERCOLE: In most New York courts, when you
22 make an application for a default judgment where seek an order
23 to show cause, you say that no prior application for the I
24 believe sought herein has been -- has been made.

25 THE COURT: Let me stop you there.

1 MR. D'ERCOLE: Yeah. Sure.

2 THE COURT: Does it matter if the statement is true?

3 MR. D'ERCOLE: Well, the statement is --

4 THE COURT: Or do you just say --

5 MR. D'ERCOLE: Well, the statement is true here.

6 Let's look at the words, right? Let's look at the words.

7 THE COURT: Which part, remind me --

8 MR. D'ERCOLE: It's Exhibit P of the complaint.

9 THE COURT: Well, which paragraph of the complaint
10 just to --

11 MR. D'ERCOLE: And it's paragraph -- well, I'm
12 referring you to the exhibit, which is the actual affirmation,
13 which is Exhibit P of the complaint.

14 THE COURT: Can the plaintiffs remind me what
15 paragraph in the complaint we're talking about here?

16 MR. KESHAVARZ: One moment.

17 THE COURT: I'll be to Exhibit P in a minute.

18 MR. D'ERCOLE: And I can read it, you know, into the
19 record and --

20 THE COURT: Hold on. Hold on.

21 MR. D'ERCOLE: Sure.

22 MR. KESHAVARZ: Paragraph 99, page 17, and
23 continuing, and also paragraph 101. They're two separate
24 misrepresentations.

25 THE COURT: Paragraph 99, I don't see the part about

1 no other action for the same relief. Oh, paragraph 101.

2 MR. D'ERCOLE: It doesn't say action, Your Honor.
3 It says application.

4 THE COURT: Okay. No prior application has been
5 made for the relief requested herein despite the third
6 collection lawsuit having been previously filed. And you say
7 that nevertheless remains true?

8 MR. D'ERCOLE: Well, an application in my view is
9 not a pleading, right? And there's law that under the --

10 THE COURT: What does application mean?

11 MR. D'ERCOLE: Well, I think it's a motion. And for
12 the relief requested herein, that was a default judgment. And
13 so I think you cannot say that this is blatantly false because
14 it's at least ambiguous. When you say no prior application
15 for the relief requested herein is reasonably interpreted to
16 mean I haven't made a motion for a default judgment in the
17 second action to date, that's a reasonable interpretation of
18 that language. And for you to say it was blatantly false, I
19 take issue with that.

20 THE COURT: I think your --

21 MR. D'ERCOLE: And if an application was a pleading
22 --

23 THE COURT: Sir. Sir.

24 MR. D'ERCOLE: Sorry.

25 THE COURT: If I'm in the middle of sentence, you've

1 got to let me finish.

2 MR. D'ERCOLE: I'm sorry.

3 THE COURT: Thank you.

4 MR. D'ERCOLE: Apologize.

5 THE COURT: Mr. DeCota also alleged in his
6 affirmation that, quote, "No prior application has been made
7 for the relief requested herein." And you are reading the
8 word application I think you said alternatively to mean A) a
9 motion, or B) and application for default judgment?

10 MR. D'ERCOLE: Well, the relief requested herein is
11 specific to the request for a default judgment be entered
12 against the plaintiff for not appearing in the action. And so
13 I think that's the most cogent interpretation of that
14 sentence.

15 And as I said, when you practice in New York courts
16 and you make this type of motion, that's a generic statement
17 that courts look at and require in your application. And it
18 is in my view perfectly true because it does not include the
19 requirement to inform the court that another action is pending
20 in another court that was never served.

21 Because even if you had that action that was pending
22 in another court that you didn't serve, that doesn't preclude
23 you from making a motion for a default judgment in the second
24 action. Your hands are not handcuffed, right, in the second
25 action.

1 Because there's a third action pending, you can't do
2 anything in the second action. Obviously you could. There
3 was a complaint that was filed, that was served, there was no
4 answer. And every attorney in New York, right, pretty much,
5 practically every attorney would file a motion for a default
6 judgment under like facts in this case.

7 And my client made of plain vanilla, as plain
8 vanilla as you can, motion for a default judgment.

9 THE COURT: I think you're -- you're making two
10 arguments here.

11 MR. D'ERCOLE: Okay.

12 THE COURT: I think one of them is very important
13 and you should make it as assiduously as you can.

14 MR. D'ERCOLE: Okay.

15 THE COURT: And that is this statement was not
16 false.

17 MR. D'ERCOLE: Was not false.

18 THE COURT: We'll put that aside for a second.

19 MR. D'ERCOLE: And not materially false. But I'll
20 get to that.

21 THE COURT: The other one, the other thing you seem
22 to be saying, which I don't understand, is that this is just
23 generic, it's required, it's boilerplate.

24 MR. D'ERCOLE: It is.

25 THE COURT: I think you're barking up the wrong tree

1 there. Because if it's required, whether it's generic and
2 boilerplate or not, it needs to be true if it's going to be
3 stated in an attorney's affirmation to a court, full stop.
4 And if it's false, I'm not saying it's false, but I'm saying
5 if it's false, the idea that it's just generic and boilerplate
6 is never going to save your client.

7 MR. D'ERCOLE: I don't disagree with you. I don't
8 disagree with Your Honor. But I'm telling it's a generic
9 statement that is made all the time.

10 THE COURT: I'm telling you that doesn't matter.

11 MR. D'ERCOLE: I understand that. But it's not
12 false because application in my -- in my view is not a
13 pleading.

14 And there is a section of the Fair Debt Collection
15 Act, I think I don't have it, but I saw it along in my
16 research, that says if you make a misstatement in a pleading
17 it's not actionable in a pleading right?

18 And I would have cited that, but in my view an
19 application is not a pleading. An application for relief,
20 especially in this case, was for a default judgment.

21 And the other thing I think you could focus on --

22 THE COURT: Can you pull Black's Law Dictionary's
23 definition of application please and print it.

24 MR. D'ERCOLE: Yeah. Sure. That's fine.

25 THE COURT: We're going to look for the definition

1 of the word application in a law dictionary.

2 MR. D'ERCOLE: I don't have Black's in front of me.

3 THE COURT: We'll have it in a moment.

4 MR. D'ERCOLE: Okay.

5 THE COURT: I don't think -- I think you're defining
6 the word application artificially narrowly.

7 MR. D'ERCOLE: So you might --

8 THE COURT: It seems to me that in the phrase
9 application for relief, when you file a complaint with the
10 court and you say the relief we want is to be paid X, that's
11 an application for relief at least from a plain English
12 common-sense perspective. We'll see what the dictionaries
13 have to say as well, but --

14 MR. D'ERCOLE: And the other point I would make is
15 that there was a materiality requirement, you know, in
16 connection --

17 THE COURT: In the FDCPA?

18 MR. D'ERCOLE: Yeah. And that's under the *Cohen*
19 case, which is the Second Circuit case decided. And numerous
20 cases come to the conclusion -- and this is the hallmark of
21 current Fair Debt Collection Act litigation -- any statement
22 that you claim is a misrepresentation must be material. And
23 what that means is that, very specifically, is that it has to
24 A) misrepresent the nature of the debt or frustrate the
25 ability of the consumer to --

1 THE COURT: Right.

2 MR. D'ERCOLE: -- respond to the complaint.

3 Now, I also cited the *Gabriel* case --

4 THE COURT: So can I just pause there for a second.

5 MR. D'ERCOLE: Yeah.

6 THE COURT: The top level misstatement that's been
7 alleged here is the bringing of, well, let me pull up the
8 statute.

9 MR. D'ERCOLE: My client wasn't involved in bringing
10 any of the actions. I just want make -- state that for the
11 record. He joined the firm after each of these three actions
12 were commenced.

13 You might say filing a third action, a duplication
14 action, and I think that's even wrong, I don't think you can
15 come to the conclusion that filing a duplicate action violates
16 the Fair Debt Collection Act, especially in landlord-tenant
17 world.

18 THE COURT: That's the question.

19 MR. D'ERCOLE: Especially in landlord-tenant world.
20 Why? Because in landlord-tenant world, you could, you have
21 the option of suing for money damages in the Supreme Court and
22 suing -- and you can't get a warrant of eviction in Supreme
23 Court, you have to go to housing court to get a warrant of
24 eviction -- so it's customary in landlord-tenant court to have
25 duplicative actions.

1 Now, what you have here --

2 THE COURT: But that's not -- you're not saying --

3 MR. D'ERCOLE: The third action is not a duplicative
4 action.

5 THE COURT: Sir, I'm in the middle of a sentence
6 here.

7 MR. D'ERCOLE: Yeah.

8 THE COURT: You're not saying that there was no
9 overlap in the relief sought?

10 MR. D'ERCOLE: There's clearly a duplicative cause
11 of action in the third action. But the third action also
12 sought a warrant of eviction which could only be brought in
13 landlord-tenant court.

14 There clearly was a duplicate cause of action. The
15 same cause of action for monetary damages was the basis of the
16 second action as well.

17 THE COURT: Right. So I'm going to hear from the --

18 MR. D'ERCOLE: Obviously I can see that.

19 THE COURT: I'm going to hear from the plaintiffs in
20 a few moments that what was misleading about this course of
21 conduct by your --

22 MR. D'ERCOLE: I mean, think --

23 THE COURT: Sir.

24 MR. D'ERCOLE: I'm sorry.

25 THE COURT: -- what was false, deceptive and

1 misleading about your client's cause of conduct here is the
2 suggestion that they owed the same money in two cases. That
3 may or may not be true. It's certainly not going to be true
4 at the end of the day, I wouldn't think, that the plaintiffs
5 in state court are going to collect twice for the same unpaid
6 rent from the same tenant. But that's not the question here.

7 The question is could a least-sophisticated consumer
8 be misled to believe that she owed this money twice. The same
9 way it's not a legal defense, you know, when you sue somebody
10 to collect a debt that's outside the statute of limitations
11 that can be an FDCPA problem, right, even though ultimately a
12 legal debt that's outside the statute of limitations is not
13 legally collectible, why wouldn't it be with citations to case
14 law the case that suing twice for the same relief can suggest
15 misleadingly that you owe that money twice?

16 MR. D'ERCOLE: It's a duplicate cause of action. If
17 you took action to -- once you got a judgment, if you took
18 action to get another judgment that's identical, that would be
19 harm. That would be something that the Fair Debt Collection
20 Act would prescribe, right? Not if you filed a duplicative
21 cause of action.

22 THE COURT: Why?

23 MR. D'ERCOLE: Why? Because, number one, in this
24 case, my client didn't file it, right? My client didn't file
25 it, so he's not responsible for there being a duplicate cause

1 of action.

2 Number two, at the time the motion for default
3 judgment was made, the third action hadn't even been served.

4 THE COURT: Should I be talking to a different
5 lawyer about this?

6 Somebody, some defendant here, maintained more than
7 one action simultaneously, right, unless you're both saying --

8 MR. D'ERCOLE: My client is an associate attorney
9 who joined the firm --

10 THE COURT: I asked a different question --

11 MR. D'ERCOLE: -- after the third action was filed.

12 THE COURT: -- about whether I should be talking to
13 a different lawyer here?

14 Is there any defendant, thank you, in this case who
15 was responsible for maintaining more than one action at a
16 time? And which lawyer, between the two of you, should be
17 speaking on that defendant's behalf?

18 MR. D'ERCOLE: Well, the Mott -- Mr. Mott signed the
19 complaints I think in each of the three actions.

20 THE COURT: Who represents him?

21 MR. PRETTER: That's our office, Your Honor.

22 THE COURT: Thank you. All right. Yes.

23 MR. PRETTER: So for the purposes of our motion to
24 dismiss, we based our motion to dismiss upon the *TransUnion*,
25 that even if there was duplicative action, there was still no

1 concrete harm that was particularized by the plaintiff in
2 order to have standing in the -- in front of this court.

3 THE COURT: Okay. We're passed the standing issue
4 now. I'm onto the substantive 1692e question.

5 So Section 1692e says that no debt collector may use
6 a false, deceptive or misleading representation, or means,
7 representation or means, in connection with the collection of
8 any debt. And without limiting the general application of the
9 following, the following of the foregoing, sorry, the
10 following conduct is a violation of this section. And, one,
11 one section is the false representation relating to the
12 character amount or legal status of any debt.

13 And I think what I understand the plaintiffs to be
14 arguing is that filing two cases seeking the same relief
15 misleadingly or falsely suggests that that debt may be
16 collectible twice.

17 And I'm not talking to you right now, so please just
18 hold it. Thank you.

19 You were responding with the section about how or
20 with the suggestion about how your client might have been in
21 one of the lawsuits but not the other, that misses the point
22 that I'm trying to get at here, which is the more fundamental
23 question of whether that course of conduct, assuming there's
24 one person on both sides, violates the statute or not, so.

25 MR. PRETTER: No. No. I mean, it's our

1 understanding and our belief that it's still -- even if it
2 violated the statute that's not enough to cause the concrete
3 harm.

4 THE COURT: Sir, you just changed the subject back
5 to standing.

6 So you concede that the statute reaches that conduct
7 assuming there's concrete injury? Or you want to be heard on
8 the merits also?

9 MR. PRETTER: I don't believe our papers discussed
10 that, that aspect what Your Honor is talking about.

11 THE COURT: So no defendant is arguing here that the
12 statute doesn't reach the filing of duplicative lawsuits? Is
13 anybody arguing that?

14 MR. D'ERCOLE: Absolutely not. I'm a defendant and
15 I'm saying as clear as day filing of a duplicative action is
16 not actionable under the Fair Debt Collection Act.

17 THE COURT: Thank you. Why? What case?

18 So let me start with a strawman here, and you can --

19 MR. D'ERCOLE: I'll tell you my reasoning.

20 THE COURT: Let --

21 MR. D'ERCOLE: Sorry.

22 THE COURT: If you file a lawsuit to collect a debt
23 that is outside the statute of limitations, I think we all
24 agree that the FDCPA can reach that conduct, no?

25 MR. D'ERCOLE: I haven't seen a case, but I would --

1 I haven't seen a case like that, but --

2 THE COURT: Assume that that's the case --

3 MR. D'ERCOLE: -- I'll assume that's the case.

4 THE COURT: -- why wouldn't filing two actions to
5 collect the same debt be similarly an action to collect that
6 which is not legally collectible?

7 MR. D'ERCOLE: In that case, you would be suing on a
8 case -- on a debt that was potentially no longer due.

9 Whereas, what you're saying is that I filed the
10 second --

11 THE COURT: Can you cite me a case?

12 MR. D'ERCOLE: Hmm?

13 THE COURT: What is the best case I should look at
14 in the Second Circuit to answer the question --

15 MR. D'ERCOLE: *Gabriel*.

16 THE COURT: -- I just posed?

17 MR. D'ERCOLE: *Gabriel*, the Second Circuit case
18 involving a default judgment, right? And in that situation,
19 the Court -- in that situation, the plaintiff did not bring to
20 the attention of the Court the fact that the defendant served
21 an answer, but maybe it -- but didn't file it correctly, and
22 the Court said that's a technical irregularity. It's not
23 material. And the FD -- Fair Debt Collection Act claims were
24 dismissed on that basis. That's the *Gabriel* claim.

25 There's also another default judgment claim in the

1 Western District of New York that came to a similar conclusion
2 with respect to default judgments. There are multiple cases
3 involving default judgments where courts have concluded that,
4 you know, a mere technical irregularity is not material.

5 Here, what is the Court saying? Is that in the
6 second action, because of the existence of the third action
7 the landlord could not move for a default judgment in the
8 second action? That would be wrong in my view.

9 THE COURT: What if -- what if venue lies in
10 multiple federal districts for a debt collection effort for
11 whatever reason and a plaintiff sues in five separate
12 districts and falsely misrepresents to each district that
13 that's the only litigation pending for that relief, you don't
14 think that could be deemed a deceptive course of action?

15 MR. D'ERCOLE: You'd have to fit it into materiality
16 mold, which I'm not sure if you could. You'd have to say that
17 the defendant consumer was prevented from fairly responding to
18 the -- those actions by making a motion for another action
19 pending or whatever motion he could reasonably make in all of
20 those actions around duplicative actions.

21 Let me say here, in this action, the third action,
22 right, the plaintiff's counsel used the default judgment in
23 the third action to move to dismiss the third action, right?
24 And ultimately the third was discontinued with prejudice,
25 right? So I'm not sure if you're aware of that, but I wanted

1 to bring that to your attention. The third action was
2 discontinued with prejudice. And the motion was made by the
3 plaintiff's counsel that they made a motion on that basis.
4 The motion wasn't decided, Your Honor. But the motion that's
5 in our papers, they utilized the default judgment in the
6 second action as the predicate for the motion to dismiss the
7 third action. And the third action is gone and discontinued
8 with prejudice.

9 So you can't adopt the judgment, right, and then use
10 it to your benefit, get rid of the third action, and now come
11 here and complain that, you know, there was a misstatement
12 made that was material in the second action. Because what
13 you're saying here at the end of the day, looking at this at a
14 high level, is you're saying that because of the existence of
15 the third action, you couldn't do anything in the second
16 action. And you might say the cause of the existence of the
17 second action, you can't do anything in the third action.
18 That would be wrong.

19 THE COURT: Let's pause there.

20 MR. D'ERCOLE: That would be wrong.

21 THE COURT: Let's pause there. All right. Thank
22 you.

23 Let's hear from plaintiff's counsel.

24 So you've heard citation to *Gabriel*. Hold on one
25 second.

1 MR. D'ERCOLE: Do you want the citation, Your Honor?

2 THE COURT: I was looking at the *Gabriel* case a
3 moment ago. Hold on.

4 MR. D'ERCOLE: And that was much more egregious with
5 the defendant there.

6 THE COURT: It's misstatements in --

7 MR. D'ERCOLE: The plaintiff. It misrepresented
8 that there was an answer. It didn't tell the Court that an
9 answer had, in fact, been filed.

10 THE COURT: All right. Turning to the plaintiff, do
11 you want to put in a supplemental briefing the fees and costs
12 issue so we can see what the Second Circuit has to say about
13 that subject, if anything, and the Supreme Court?

14 MR. KESHAVARZ: I would be glad to. If Your Honor
15 thinks it would be helpful, I'd be glad to do that.

16 THE COURT: Yeah. I think you may have an uphill
17 battle on the notion that the anxiety is a concrete harm. I
18 say that not meaning to diminish anybody's anxiety, but I
19 think your winningest argument in my estimation so far on the
20 standing point is the actual out-of-pocket expenditure of
21 money. And to the extent you only have a Fourth Circuit case
22 rather than Second Circuit cases, I think it would behoove us
23 to drill down on that one level deeper.

24 MR. KESHAVARZ: I'd be glad to do that. When would
25 you like that? Two weeks?

1 THE COURT: A week from Friday let's say.

2 MR. D'ERCOLE: I'm sorry --

3 MR. KESHAVARZ: Can I get one more week? I have a
4 depositions lined up --

5 THE COURT: Yes.

6 MR. KESHAVARZ: -- for the next --

7 THE COURT: All right. Two weeks from Friday is
8 fine.

9 MR. KESHAVARZ: Two weeks from Friday. Thank you.

10 MR. PRETTER: That for defendants as well, Your
11 Honor?

12 THE COURT: Yes.

13 MR. PRETTER: I would just ask, sorry, I'm looking
14 at a calendar, that would be September 1st?

15 THE CLERK: Yes.

16 THE COURT: September 1st for everybody. Okay.

17 MR. PRETTER: And if, Your Honor, if we could -- if
18 we could bring in that brief regarding the actual plaintiff
19 who's actually paying for those costs or those costs are
20 incurred by her counsel that --

21 THE COURT: Yeah. So there's always the ability to
22 submit affidavits and other more specific information when
23 you're talking about jurisdiction rather than failure to state
24 a claim. And if you would like to say something more, for
25 example, about the amount of copying costs incurred, I would

1 welcome an affidavit to that effect.

2 MR. KESHAVARZ: How long will I make -- will I be
3 able to make that letter?

4 THE COURT: Let's say no longer than five pages.

5 MR. KESHAVARZ: Thank you.

6 THE COURT: And feel free to write it shorter if you
7 can. I actually don't think this is a five-page issue. I
8 think you should -- you could be able to do it in three with
9 relative ease.

10 All right. So turning to the merits --

11 MR. PRETTER: And I guess that will be e-filed,
12 correct, or sent to the Court?

13 THE COURT: Everything is e-filed.

14 MR. PRETTER: Okay.

15 THE COURT: Turning to the merits, why does --
16 assuming -- let's assume this is abusive conduct, that if I
17 was a New York State Supreme Court Justice I would be deeply
18 unhappy about it because there are all these different cases
19 pending, and allegedly the courts in each case are not being
20 told about what's going on in the other cases, and it may be
21 that they're being told something at best misleading and at
22 worst false -- I have the definition of application from
23 Black's Law Dictionary in front of me now and application is
24 defined simply to mean a request or petition, full stop,
25 that's definition one, definition two is motion, so saying

1 you've made no other application for this relief seems at
2 least to me like something that a lawyer would want to be more
3 careful in respect of and at worst something that had the
4 effect of potentially misleading the Court even if that was
5 not intended, but that -- be that as it may, why is this a
6 federal case under the FDCPA?

7 MR. KESHAVARZ: I would be glad to say that.

8 But if I could -- you said one sentence before that
9 I want to add one -- two sentences back if I could?

10 THE COURT: Sure.

11 MR. KESHAVARZ: You talked about cases that say
12 emotional distress is not concrete harm. I think the
13 important aspect is if you're making the claim for economic
14 damage or if you're making a claim for a common law analog, I
15 think that's a big distinction. And I can go into it a little
16 more later, but I just wanted to touch on the issue of
17 emotional distress being a concrete harm. That's not in the
18 context I don't believe in if you get to the point of common
19 law analog. So I just wanted to put that aside. And now I
20 can answer your question.

21 Okay. So to answer your question, the
22 representation is false in a couple of different ways. One,
23 you talk about the plain meaning, but the issue is, I think
24 you hit it on the head about the time-barred lawsuits, which
25 is *Cameron v. LR Credit* in the Southern District of New York.

1 The issue is -- this is a means and also
2 communication to the judge, and also to the consumer. How is
3 that representation made to the consumer?

4 It's made to the consumer in two ways. One, is that
5 a client found out about the application for default judgment.
6 That is in our papers, at the first hearing. The hearing for
7 the first lawsuit, says, hey, I just found out that they're --
8 I think she said they got a judgment from me in the Supreme
9 Court case, so she found out at that point that this is a
10 Supreme Court case seeking a judgment. Okay?

11 So under *Arias*, communication filings in court
12 oftentimes come to the attention of the consumer. That's one
13 reason why it's actionable. That's *Arias*. So that's one
14 misrepresentation to the -- and as to -- also to Ms. Onfroy.

15 The other misrepresentation is when she is served
16 with a third lawsuit saying we are entitled to a judgment for
17 the same rank, and by the way, for attorneys fees.

18 Both seek attorneys fees for the same thing. And
19 they got attorneys fees for \$5,000 in the Supreme Court case
20 and now they want another 5,000 in the district court.

21 But the point is this. The misrepresentation is
22 doing both of those things at the same time.

23 THE COURT: Is the litigation to collect something
24 that's out of the limitations period the best analog you have?

25 MR. KESHAVARZ: Two analogs, that and *Arias*. *Arias*

1 held many different things. One of the things it held was a
2 consumer living on social security disability, the debt
3 collection law firm, Gutman Mintz, restrains his exempt money.
4 Under state law, he has a right to file what's called an
5 objection claim form saying, hey, all my money is exempt. He
6 did that. He attached bank statements.

7 And Gutman's might say, great, I also have a legal
8 right, which is true, to file an objection to the exemption
9 claim form and have a state court judge make a determination
10 whether, in fact, the money is exempt.

11 The Second Circuit says while you may have that
12 legal, technical legal right, it is deceptive to the least-
13 sophisticated consumer to suggest that you have a lawful right
14 to object to the exemption claim form when, in fact, you have
15 all of the evidence to show that it was exempt, that is both
16 deceptive to the consumer, even though he has a legal right to
17 do it, because there's no basis for it. And also unfair and
18 unconscionable. That's what the Court said in two regards.

19 So that is --

20 THE COURT: So that -- so *Arias* is that case. And
21 then the statute of limitations case you said is what?

22 MR. KESHAVARZ: *Cameron vs. LR Credit*. And to
23 expound upon why you argue correctly that that is similar
24 here, a debt collector has a legal right to file a time-barred
25 suit. There's nothing illegal about doing that. And you --

1 THE COURT: Well, you may have a Rule 11 problem or
2 whatever the state equivalent is. But you may have that here
3 too.

4 MR. KESHAVARZ: But what debt collectors say is the
5 -- in the early litigation on this issue, the debt collection
6 law firm would say, well, the consumer can waive that
7 affirmative defense, which is also technically true, but the
8 point, the reason why *Cameron*, and every other court that I
9 know of, has considered that has said, while you have a
10 technical legal right to file this suit, it is deceptive to
11 the least-sophisticated consumer, and also under GBL 349, to
12 say you have a legal right to obtain the judgment when you
13 don't have a legal right to do it because it's barred.

14 THE COURT: Yeah. It's a -- so I understand
15 everything you're saying, and I understand the appeal of it,
16 is it a little different here in the sense that when you sue
17 to collect a debt that has expired under the applicable
18 statute of limitations, there's something inherently
19 misleading about that.

20 Whereas when you sue to collect a debt that really
21 is collectible, and you just sue to collect it in two
22 different forums, it may not be as inherently misleading.

23 There's no affirmative suggestion that by the way, even
24 if we win in lawsuit A, we're still going to try to collect in
25 lawsuit B. It may just be two means to the same end.

1 Why is it inherently -- I mean, walk me through the
2 logic of like why would the least-sophisticated consumer
3 believe that he or she is obligated to pay twice?

4 MR. KESHAVARZ: That's an excellent question, and
5 there are -- let me unpack that in a few different ways.

6 First, it misrepresents the nature of the debt.
7 Opposing counsel indicated materiality. He defined
8 materiality in two different ways as a misrepresentation to
9 the least-sophisticated consumer of the nature of the debt.

10 And two, there's a --

11 THE COURT: But how? So in the statute of
12 limitations example, you're misrepresenting the nature of the
13 debt as collectible when, in fact, it's uncollectible.

14 You're misrepresenting the nature of the debt here
15 how?

16 MR. KESHAVARZ: You're misrepresenting it in total
17 because the two suits together --

18 THE COURT: It's the implication that the person
19 owes 2X what they really owe?

20 MR. KESHAVARZ: That's what the least-sophisticated
21 consumer would see it as. And that's one of the reasons why a
22 line of cases on liability go to what's called meaningful
23 attorney review. A signature on a complaint by a lawyer is a
24 representation, an implied representation, to the least-
25 sophisticated consumer that the attorney has made an

1 independent legal determination that their client has a right
2 to the relief sought. And to do that at the same time, to
3 make that representation to the consumer that our client has a
4 right to a judgment in this case, and a judgment in this case
5 and \$5,000 both is misleading.

6 The least-sophisticated consumer would be going, oh,
7 what am I going to do? How am I going to fight this? That's
8 why it's unfair. Should I pay it? Not that you have to pay
9 it, but it puts pressure on the consumer to do that.

10 THE COURT: Well, it's certainly pressure. I agree
11 with that. That's a time-honored and not always honorable
12 legal strategy, that, oh, we'll try to make our opponents
13 fight on multiple fronts and that will just wear them out, but
14 being oppressive and being misleading are potentially two
15 different things.

16 MR. KESHAVARZ: Well, the issue would be -- well,
17 the standard for the least-sophisticated consumer is very low.
18 You know, would they -- would they be unclear about what their
19 rights are? Under this set, among many other things, or are
20 they misrepresenting the amount that they can get?

21 THE COURT: Yeah.

22 MR. KESHAVARZ: If they're saying that we can get
23 two judgments, I mean, I can't see the least-sophisticated
24 consumer, sophisticated consumer, any consumer, saying --
25 understanding that to mean something other than what it says.

1 The other case that's analogous is *Villalba*, in the
2 Eastern District. That said --

3 THE COURT: Why does *Gabriel*, how do you square
4 *Gabriel* with the statute of limitations and the analogous
5 cases we're talking about?

6 MR. KESHAVARZ: That's a very good point, because
7 *Gabriel* was about the issue of materiality. That was about
8 whether someone had filed something when they didn't.

9 The Second Circuit says that has nothing to do with
10 collections. If it's true, it doesn't affect your rights. If
11 it's untrue, it doesn't affect your rights. It's not
12 material. The fact that it happened in a court litigation is
13 not the point. The point is so what? And the Court said this
14 has nothing to do with collection regardless if it's true or
15 not.

16 THE COURT: What was the series of
17 misrepresentations at issue there?

18 MR. KESHAVARZ: It's been a while since I read it,
19 but my recollection is that there was a filing by the debt
20 collector that falsely said that the person had filed
21 something, had not filed something when they did. And the
22 Second Circuit was that filing doesn't have to do with the
23 collection of the debt. It doesn't -- it doesn't make it
24 harder for you to challenge the debt.

25 Here, in contrast, it definitely makes it harder.

1 You have to fight on two fronts, right? You have to go to
2 court in the third case even after there was a judgment in the
3 -- in the second case. Actually, that's something that I
4 think is very important to make absolutely clear --

5 THE CLERK: Counsel, I (inaudible).

6 THE COURT: So Krug is the lawyer in *Gabriel*. Krug
7 affirmed in the state complaint that it would serve copies of
8 exhibits on Gabriel. That's alleged to be false. And Krug
9 filed a notice of compliance with that requirement when, in
10 fact, they had not complied. Krug also filed two motions for
11 default when Gabriel was allegedly not in default and
12 prematurely filed a motion for judgment of strict foreclosure
13 in violation of a procedural rule.

14 So not every misstatement in a landlord-tenant
15 collection action or eviction action is an FDCPA violation.

16 MR. KESHAVARZ: It has to matter in some regard.
17 And the best case synthesizing *Gabriel* for state court
18 litigation is the most recent one, just came out several
19 months ago, and that's *Villalba vs. Houslanger & Associates*,
20 2022 Westlaw 900538, and that synthesizes everything.

21 THE COURT: That's *Villalba versus whom*? Sorry.

22 MR. KESHAVARZ: *Houslanger & Associates*. Now, in
23 that sense -- that's actually an excellent case. In *Villalba*,
24 the consumer was never served with a collection lawsuit. The
25 debt collector filed a false affirmation of service that he

1 was served when he wasn't. The client gets a default
2 judgment. Ten, 15 years later, his bank gets garnished. He
3 files an order to show cause saying I was never served with
4 this suit. And they made him come back multiple times to
5 oppose it. Ultimately the case was discontinued.

6 The debt collector there tried to say, well, those
7 misrepresentations were not material because the consumer, in
8 fact, knows that they were never served so how could you be
9 deceived?

10 And Judge Chen said, no, the case law post *Gabriel*
11 is the least-sophisticated consumer getting a document signed
12 by a lawyer saying that we have a right to do this, a consumer
13 would still think, okay, a lawyer's telling me this, there
14 must be some sort of basis for it even though there wasn't.

15 And the other thing that's similar to here, and also
16 in *Arias*, is multiple adjournments of the third suit. And
17 this is very important because there was a judgment entered, a
18 judgment actually entered in Supreme Court, and they made this
19 poor woman come back to court over and over again.

20 THE COURT: Why don't you have a remedy for that in
21 the state court --

22 MR. KESHAVARZ: Because --

23 THE COURT: -- for the request for attorneys fees or
24 otherwise? I mean that sounds like an abuse of the litigation
25 process, but not necessarily, necessarily an FDCPA violation?

1 MR. KESHAVARZ: There are many answers to that. The
2 easiest answer in housing court is that you don't have -- it's
3 a court of limited jurisdiction. You can't implead a new
4 party in an FDCPA case if that party -- that person is not a
5 party. You can't bring counterclaims not related to the
6 underlying housing. You can't bring --

7 THE COURT: But then you don't have the same party
8 suing you in both cases, no?

9 MR. KESHAVARZ: No. You can't sue the law firm I
10 mean. You can't sue a law firm in their own key case because
11 they're not a party.

12 THE COURT: Yeah. But why can't -- they're not a
13 party, but why can't you get attorneys fees for abuse of the
14 state court litigation process?

15 MR. KESHAVARZ: Because issues -- and this is in our
16 papers and expanded in more detail -- but things that are
17 related to tort actions, tort type issues, the court doesn't
18 have jurisdiction. The housing court has limited
19 jurisdiction. You cannot bring those type of actions in
20 housing court. You just can't.

21 THE COURT: Can I -- I'm going to ask a basic
22 question, which is probably remedial and possibly embarrassing
23 from my perspective, but it's the -- it is the case all the
24 time that venue would lie in a given case in both the Eastern
25 and Southern Districts of New York, which as you know are very

1 close to each other.

2 Imagine that a plaintiff just routinely, you know,
3 files in the Eastern and Southern District of New York and
4 never tells the other district about the case, the other case,
5 what problem does that lawyer have under the Rules of Civil
6 Procedure in federal court or otherwise? Like is it obvious
7 to you that that's not allowed? And if it's not allowed, why?

8 MR. KESHAVARZ: A couple of things.

9 One, it would have to be for a collection of a
10 consumer debt, you're assuming the least-sophisticated
11 consumer --

12 THE COURT: Oh, I don't mean the FDCPA. Like it
13 could be anything. Let's say it's a breach of contract action
14 and it's just being brought in diversity and venue lies in
15 both Eastern and Southern, but you file here and you file
16 there and you just don't tell anybody that you're filing in
17 both courts, presumably that lawyer would have a problem, but
18 I'm not sure I understand, as I sit here, what problem exactly
19 that would be.

20 MR. KESHAVARZ: Well, if they get two judgments in
21 two districts for the same cause of action, then they --

22 THE COURT: The judges would be very upset. This is
23 a waste of judicial resources. It's inefficient. It's all
24 kinds of other things, but I'm trying to understand what rule
25 it violates?

1 MR. KESHAVARZ: Rule of procedure, like a Rule 11?
2 I don't know what statute that it --

3 THE COURT: Rule 11, the local rules of the Eastern
4 and Southern Districts of New York, the principles of
5 collateral estoppel, I mean, or, you know, some duty of candor
6 to the court. I don't know what it is.

7 MR. D'ERCOLE: May I comment on that?

8 THE COURT: In a minute, sure. But hold on for the
9 moment.

10 MR. KESHAVARZ: I'm not sure. But that raises a
11 related point, and then I'll try to get back to your question.

12 That is why you have the FDCPA, is because remedies,
13 traditional state court remedies, are not sufficient to deter
14 this kind of practice. So you could file a Rule 11, for
15 example, in the two state court actions by saying your
16 signature's a representation that there's a good-faith basis
17 for that. You're implying to the judge and to the party that
18 you have a right to get that relief in this court. And he's
19 doing the same thing in the other court --

20 THE COURT: Well, you have a right to get relief in
21 either court in my hypo, until you get relief in whatever
22 court comes first with the relief, and then, then you have no
23 more right to relief in the other court. But at the moment
24 you file both cases, you have a theoretical right in each.

25 MR. KESHAVARZ: Right.

1 THE COURT: All right. We'll leave it there.

2 I think I do need to understand, from your
3 perspective, first and foremost, a little better why you
4 believe these successive actions in the state court were
5 clearly duplicative. Right?

6 We heard a little bit from defense counsel about how
7 different courts in the constellation of the New York State
8 Court System can issue different relief that others can't.

9 Were these -- were these cases truly duplicative or
10 were there sufficient enough differences among them to
11 overcome your suggestion that the only reason for filing
12 multiple cases could be the benefits of misrepresentation?

13 MR. KESHAVARZ: The amounts sought was for the exact
14 same months of rent. The landlord-tenant action also sought
15 possession. Now, if they just filed a suit for possession and
16 didn't try to get a judgment for the same money in Supreme
17 Court, well, then you wouldn't have a misrepresentation as to
18 the amount of the -- you're able to getting a double judgment.
19 That's not what they did.

20 They tried to get a double judgment or at least they
21 represented they had a right to do that.

22 And the last point on that, I keep saying the last
23 point, and it's never the last point, but there's no greater
24 sound for a trial lawyer than the sound of his own voice, so,
25 it was DeCota that both signed the affirmation to enter

1 default judgment in Supreme Court and went to the hearing in
2 the third action after that and said, no, I want to keep this
3 case going. I want to keep on resetting the hearing and
4 resetting the hearing and resetting the hearing after we've
5 already gotten a judgment.

6 They didn't say, judge, we have to discontinue our
7 -- at least our claim for the money. No, we want to keep this
8 case going.

9 Ultimately, after Mr. DeCota left, Mott continued.
10 And the clock -- they wouldn't dismiss the case.

11 THE COURT: So the default judgment comes in the
12 Supreme Court action?

13 MR. KESHAVARZ: That's right. Right. And then Mott
14 would not dismiss the case after bringing my client to court
15 over and over again. She had to get a legal service attorney
16 to file a motion to dismiss. And you know what they did?
17 They said, no, I want you to come back again so we can file an
18 opposition. We got a judgment from the Supreme Court, but we
19 should still be able to proceed to that. We want to be able
20 to file an opposition.

21 And then at the next hearing, they vigorously, Mott
22 vigorously sought to obtain -- to let the third case continue
23 to be able to get the same judgment.

24 THE COURT: What is the third case? We're talking
25 about the Supreme Court action, the housing court action, and

1 a third case?

2 MR. KESHAVARZ: I call it the third case. The two
3 cases at real issue in this case, it's the second case and the
4 third case. The second case is the Supreme Court action. The
5 third case is the LMT action for the same debt. There is a
6 prior LMT that's really just kind of collateral, but just to
7 keep the lawsuits straight, that's why I'm calling it the
8 third case.

9 THE COURT: Sorry. So what's the first case?

10 MR. KESHAVARZ: The first case is kind of
11 tangential. It was to try to collect one month's of rent.

12 THE COURT: Oh, I see.

13 MR. KESHAVARZ: And the reason we put it in there is
14 because the corporate structures for the landlord signed the
15 actual papers, so they're actually directly involved in the
16 collection action. And that also says that's when the client
17 found out about the Supreme Court case. And she put it in her
18 papers. So that's why we referenced the first case.

19 THE COURT: Okay. You wanted to be heard on the
20 question of duplicative litigation?

21 MR. D'ERCOLE: On a few things, Your Honor.

22 Number one, my client never made any such statements
23 to any court. And plaintiff's counsel is paraphrasing.

24 The third action got adjourned several times. And
25 if you look at the front file folder, which is in the papers,

1 the plaintiff made a knee-wrap application, which is an
2 emergency relief application, to get money from the state or
3 federal government to pay the outstanding rent. And it's
4 referenced in the front file folder because this application
5 was pending, which would have paid the judgment. The case was
6 adjourned, you know, several times. Right?

7 My client, to the extent, and it's not clear that he
8 even appeared at a calendar call, if you go to a calendar call
9 and the case is adjourned, that's not a basis for relief
10 against my client for anything.

11 But let me -- let me just -- you have to separate my
12 client. I represent one defendant. I don't represent the
13 Mott defendants. I represent Kenneth DeCota.

14 To the extent you find there's something wrong about
15 filing the third action, my client had nothing to do with it
16 than sign the complaint, then file the complaint, then
17 prosecute the complaint. All he did was, as a second -- as an
18 attorney admitted to the bar in 2020, his first -- this was
19 his first job, he's given a file folder, go make an
20 application for a default judgment. And in that case, it was
21 perfectly correct that the landlord could sue for that money
22 and obtain a default judgment.

23 To the extent the landlord did anything inconsistent
24 to get a third judgment, then maybe you could find fault with
25 that. Right?

1 But my client didn't file a complaint and didn't --

2 THE COURT: He filed an affirmation that said no
3 other application for the same relief was --

4 MR. PRETTER: Which was absolutely correct. And you
5 just read it. It's a motion, right? And you all said --

6 THE COURT: I read definition two as a --

7 MR. PRETTER: -- you might say it's vague, might say
8 it's vague, but you can't say it's false, and it's not
9 material.

10 THE COURT: The first definition of application is a
11 request. This is Bryan Garner, Black's Law Dictionary, 11th
12 Edition.

13 MR. D'ERCOLE: Okay.

14 THE COURT: So substitute the word request for
15 application, is that statement still true?

16 MR. D'ERCOLE: Yeah.

17 THE COURT: Really?

18 MR. D'ERCOLE: I'm sorry. I was distracted. I was
19 thinking about the definition of pleading under Black's Law
20 Dictionary.

21 THE COURT: A request?

22 MR. D'ERCOLE: A request is a -- application is a
23 request. yes.

24 THE COURT: All right. So if we substitute the word
25 request, is the statement still true? No other request for

1 this relief is pending? Of course not.

2 MR. D'ERCOLE: No other request for a default
3 judgment is pending, correct. For a default judgment. You
4 can't -- you can't --

5 THE COURT: You're slicing that a little thinly
6 also.

7 MR. D'ERCOLE: You can't -- you can't
8 (indiscernible). I mean, talk about your hypothetical, right?
9 Your hypothetical, all the time parties race to the
10 courthouse, they run and they race to the courthouse. And one
11 party may file an action here, and an adverse party might file
12 here that has duplication.

13 THE COURT: Yeah. That's a different hypo.

14 MR. D'ERCOLE: I understand that.

15 THE COURT: We're talking about the same party
16 filing.

17 MR. D'ERCOLE: Right. By the same party. What your
18 -- your hypothetical is not reasonable because --

19 THE COURT: Why?

20 MR. D'ERCOLE: -- because it would have to be in
21 secret, right? If you had two actions involving the same
22 parties, one party would make a motion to dismiss it based on
23 another action pending. It would have that relief, right?

24 To the extent that an action was filed in the
25 Southern district and then a plaintiff filed the same action

1 in the --

2 THE COURT: Why isn't that this case? That's the
3 question.

4 MR. D'ERCOLE: It's not this case.

5 THE COURT: Why?

6 MR. D'ERCOLE: Because number one, it's not a
7 duplicative action because you can't -- you couldn't get
8 possession, you couldn't get a warrant of eviction in the
9 Supreme Court, you had to file the third action. You had to
10 file it.

11 THE COURT: Why didn't you just file the third
12 action and not the second action?

13 MR. D'ERCOLE: Why? Because he had -- the landlord
14 had that option to do it. It's not against the law. It's not
15 a violation of the Fair Debt Collection Act to go -- it's an
16 option that parties have.

17 THE COURT: Well, it is if it's misleading. I mean,
18 that's what we're here to decide --

19 MR. D'ERCOLE: Again, now you're talking about --

20 THE COURT: -- I mean, you're assuming --

21 MR. PRETTER: -- now you're not separating it.
22 You're not separating it again. You're talking about the
23 existence of filing three complaints, right? You find fault
24 with having -- forget about the first complaint, the two
25 complaints that are duplicative, you find that as problematic.

1 Well, my client didn't file it. My client wasn't part of the
2 decision-making process to file those two complaints or to
3 prosecute them. He made a plain vanilla application for a
4 default judgment and nothing he said in that was material,
5 materially false. The landlord --

6 THE COURT: Okay. Again, again, I'm hearing from
7 the wrong --

8 MR. D'ERCOLE: The landlord --

9 THE COURT: Sir, when I start talking, you stop
10 talking. It's really that simple.

11 I'm hearing from the wrong lawyer on this issue
12 again because I have a higher level question than the one
13 you're answering, which is simply the merits question of
14 whether this course of conduct, assuming there are one or more
15 defendants who are responsible for the whole thing, is conduct
16 the FDCPA reaches?

17 And you're making a much more narrow point about
18 your individual client's involvement in both cases. I know
19 the facts on this. I don't want to hear that argument again
20 because we've heard it a bunch of times now.

21 And we will now, thank you for your arguments here,
22 be adjourned.

23 Let's just make sure we have clarity on the time
24 line for the deliverables, which is I think that both sides
25 are going to submit letters on September 1st regarding the

1 fees and costs issue for standing purposes.

2 Anything else from the plaintiff's side before we
3 adjourn today?

4 MR. KESHAVARZ: No. Thank you very much, Your
5 Honor.

6 THE COURT: All right.

7 MR. PRETTER: Just if we could make comment
8 regarding Your Honor's hypothetical before the filing in
9 different venues.

10 Maybe even the different states or different
11 jurisdictions, it could even be -- it could rise even to, I
12 guess, a legal malpractice if an attorney doesn't file in the
13 appropriate venue. That's why an attorney might file in
14 multiple venues in order to make sure to cover his client's
15 interests, which I think might be comparable here where you
16 have the state court, the Supreme Court action, and a
17 (indiscernible) action to make sure the client's interests are
18 covered in all bases for either the right of eviction or for
19 right of arrears.

20 THE COURT: So your point is it may not -- it may
21 not even just be permissible to file in multiple forums, it
22 may be required --

23 MR. PRETTER: Right.

24 THE COURT: -- of the lawyer? I understand the
25 point.

1 All right. Thank you all. We will endeavor to get
2 an answer out to you as quickly as we can.

3 ALL COUNSEL: Thank you, Your Honor.

4 (Proceedings concluded at 3:58 p.m.)

5 I, CHRISTINE FIORE, court-approved transcriber
6 and certified electronic reporter and transcriber, certify
7 that the foregoing is a correct transcript from the official
8 electronic sound recording of the proceedings in the above-
9 entitled matter.

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12 August 24, 2023

13 _____
Christine Fiore, CERT

14 Transcriber
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